Re Haji Sazali

HIGH COURT (KUCHING) — ORIGINATING MOTION NO KG 19 OF 1991
CHONG SIEW FAI J
22 MAY 1992

Administrative Law *— Remedies — Certiorari — Applicant remanded at drug rehabilitation centre — Application for certiorari to quash magistrate's detention order — Whether magistrate had considered requisite matters before making decision — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a), (3) & (4)*

Administrative Law *— Judicial review — Magistrate's order that applicant be remanded at drug rehabilitation centre — Whether subject to judicial review — Whether magistrate may subsequently affirm affidavit to explain or add reasons to his decision — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a)*

The applicant was arrested on suspicion of being a drug dependant. The magistrate ordered the applicant to be remanded at a drug rehabilitation centre for two years to undergo treatment and rehabilitation under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant applied for an order of certiorari to quash the magistrate's decision firstly, on the ground that the magistrate had failed to consider the rehabilitation officer's report as required under s 6(3) of the Act and secondly, the magistrate had failed to comply with s 6(4) of the Act when he did not have regard to the circumstances of the case and the character, antecedents, age, health, education, employment, family and other circumstances of the applicant. In answer to the application for certiorari, the magistrate affirmed two affidavits stating that he had considered the matters specified in s 6(3) and (4) of the Act.

Held, allowing the application:

(1) The argument that an order under s 6(1)(a) of the Act was not amenable to judicial review, was not accepted.

(2) It was not open nor appropriate for the magistrate to subsequently explain or add reasons to his decision when his judgment showed that he had not apparently done so. The magistrate's affidavits would therefore be disregarded since his judgment itself formed the focal point of argument.

(3) This, however, does not mean that under no circumstances can a presiding magistrate make an affidavit when his decision is the subject matter of judicial review. In certain situations, the magistrate may be justified and indeed entitled to affirm an affidavit or even to appear at the hearing when his character or bona fides is called in question.

(4) In this case, the magistrate gave no reason for the decision. It was also not shown that the magistrate had considered the matters specified in s 6(3) and (4) of the Act. Nor was it stated in the note

of proceedings that the magistrate was satisfied that the applicant was required to undergo treatment and rehabilitation under s 6(1)(a) of the Act.

(5) It is essential that magistrates give reasons for their decision. It is incumbent on the magistrate to indicate in his judgment that s 6(3) and (4) of the Act have not been overlooked. No particular form of words is needed for this purpose. What is necessary is that the magistrate's mind should be clearly revealed that he has considered such matters. The absence of any recording that such matters had been considered, indicates the possibility that such matters may not have influenced the mental process of the magistrate in arriving at his ultimate decision.

(6) Section 24 of the Act does not have the effect of relieving a magistrate from the need to record anything in coming to a decision. Section 24 of the Act deals with the jurisdiction of magistrates in relation to areas or localities for exercising the powers under certain sections of the Act.

[Bahasa Malaysia summary

Pemohon telah ditangkap kerana beliau disyaki seorang penagih dadah. Majistret telah mengarahkan supaya pemohon ditahan di sebuah pusat pemulihan dadah selama dua tahun untuk menjalani rawatan dan pemulihan di bawah s 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta itu'). Pemohon telah memohon perintah certiorari untuk membatalkan keputusan majistret itu, pertamanya atas alasan bahawa majistret telah gagal mempertimbangkan laporan pegawai pemulihan seperti yang dikehendaki di bawah s 6(3) Akta itu dan keduanya, majistret telah gagal mematuhi s 6(4) Akta itu apabila beliau tidak memberi perhatian kepada keadaan kes itu dan kelakuan, latar belakang, umur, kesihatan, pendidikan, pekerjaan, keluarga dan keadaan lain pemohon itu. Sebagai jawapan kepada pemohonan certiorari, majistret telah mengesahkan dua afidavit yang menyatakan bahawa beliau telah mempertimbangkan perkara-perkara yang ditentukan dalam s 6(3) dan (4) Akta itu.

Diputuskan, membenarkan permohonan itu:

(1) Hujah bahawa sesuatu perintah di bawah s (6)(1)(a) Akta itu tidak boleh menjadi perkara kajian semula kehakiman tidak boleh diterima.

(2) Tidak terbuka kepada atau patut untuk majistret kemudiannya menjelaskan atau menambahkan sebab kepada keputusannya apabila penghakimannya menunjukkan bahawa beliau nampaknya tidak membuat demikian. Oleh itu, afidavit majistret tidak akan dipedulikan kerana penghakimannya sendiri membentuk titik fokus hujah itu.

(3) Akan tetapi, ini tidak bermaksud bahawa majistret tidak sekalikali boleh membuat afidavit apabila keputusannya menjadi perkara kajian semula kehakiman. Dalam situasi tertentu, majistret itu

mungkin berjustifikasi dan berhak mengesahkan afidavit atau untuk hadir pada pembicaraan apabila kelakuan atau bona fides beliau dipersoalkan.

(4) Di dalam kes ini, majistret tidak memberi alasan bagi keputusannya. Ia juga tidak ditunjukkan bahawa majistret telah mempertimbangkan perkara-perkara yang ditentukan dalam s 6(3) dan (4) Akta itu. Juga tidak dinyatakan dalam nota prosiding yang majistret berpuas hati bahawa pemohon diperlukan menjalani rawatan dan pemulihan di bawah s 6(1)(a) Akta itu.

(5) Adalah perlu untuk majistret memberi alasan bagi keputusan mereka. Adalah wajib bagi majistret untuk menunjukkan di dalam penghakimannya bahawa s 6(3) dan (4) Akta itu tidak diendahkan. Bentuk perkataan yang tertentu tidak perlu untuk tujuan ini. Apa yang diperlukan adalah supaya fikiran majistret memperlihatkan dengan jelas yang beliau telah mempertimbangkan perkara ini. Ketiadaan sebarang perakaman bahawa perkara itu telah dipertimbangkan, menunjukkan kemungkinan yang perkara itu tidak mempengaruhi proses mental majistret apabila mencapai keputusan muktamad.

(6) Di dalam kes ini tidak ditunjukkan bahawa majistret telah mempertimbangkan perkara seperti yang diperlukan oleh s 6(3) dan (4) Akta itu sebelum membuat keputusan.

(7) Seksyen 24 Akta itu tidak mempunyai kesan melepaskan majistret daripada keperluan mencatat apa-apa sahaja apabila mencapai keputusan. Seksyen 24 Akta itu berhubung dengan bidang kuasa majistret berkenaan dengan kawasan atau tempat untuk menggunakan kuasa di bawah seksyen tertentu Akta itu.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed) paras 48–316.

Cases referred to

1 *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41; [1954] 3 WLR 415 (refd)

2 *R v Thornton & Ors* (1898) 67 LJQB 249 (refd)

3 *Re Roshidi bin Mohamed* [1988] 2 MLJ 193 (folld)

Legislation referred to

Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 6(1)(a), (3), (4), 24

Idris Hj Buang (*Idris Buang Ibrahim Baki & Co*) for the appellant.
Mahmud Abdullah (Senior Federal Counsel) for the respondent.

Cur Adv Vult

Chong Siew Fai J: The applicant, Haji Sazali bin Datuk Noor Tahir, is applying for an order of certiorari to remove into this court for the purpose

of being quashed, an order made by a learned magistrate in Kuching, on 29 July 1991 and for an order that his name 'be suspended from the roll of the drug rehabilitation centre'.

The facts are brief and simple. On or about 21 July 1991 the applicant was arrested by the police on suspicion of being a drug-dependant. On 23 July 1991 he was remanded for seven days at the Sarawak Drug Rehabilitation Centre ('the centre') to enable tests to be conducted as to whether the applicant was a drug-dependant. On 29 July 1991, the applicant was brought before the trial magistrate who ordered him 'to be remanded' at the centre for two years with effect from the date of the order.

Two grounds are relied on in support of the application:

(1) that the learned magistrate failed to consider the rehabilitation officer's report as required under s 6(3) of the Drug Dependants (Treatment And Rehabilitation) Act 1983 ('the Act'); and

(2) that the learned magistrate failed to comply with s 6(4) of the Act in that he did not have regard to the circumstances of the case and the character antecedents, age, health, education, employment, family and other circumstances of the applicant.

Before dealing with the above grounds, it would be convenient to dispose of one point. In answer to the applicant's contention of failing to consider and to have regard to the matters specified in the two grounds above, the learned magistrate made an affidavit on 27 February 1992 to the effect that before making the 'residing' order, he had duly considered the matters stated in the grounds. Counsel for the applicant contends that the affidavit is irrelevant and ought to be excluded. On the facts and circumstances of the instant case, I agree that it is not open or appropriate for the learned magistrate to subsequently explain away or add reasons to his decision by stating as he did, namely, that he had considered and given regard to the said matters, when in his judgment contained in the note of proceedings, he apparently was not shown to have done so. In my view, such affidavit cannot be used since the judgment itself forms the focal point of argument. I would therefore disregard the said affidavit as well as the subsequent 'Corrective Affidavit' of the learned magistrate affirmed on 28 April 1992. However, I must not be taken to mean that under no circumstances can a presiding magistrate make an affidavit when his decision is the subject matter of judicial review. That would be too general a statement. In certain situations he might be justified and, indeed, entitled to do so or even to appear at the hearing, for example, when his character or bona fides is called in question. *R v Camborne Justices, ex p Pearce*;[1] *R v Thornton & Ors*.[2]

Now, as to the grounds of the application, s 6(3) of the Act, inter alia, requires a magistrate, before making a 'residing' order under s 6(1)(a) thereof, to consider a report by a rehabilitation officer on the person against whom the order is intended to be made ('the subject'). And s 6(4) thereof enacts that in making the said order, the magistrate shall have regard to the circumstances of the case and the character, antecedents, age, health, education, employment, family and other circumstances of the subject. In both subsections, the word 'shall' is used.

In the instant case, though the note of proceedings indicates that the medical report (exh P1) and the 'social' report (exh P2) were tendered, that the 'social' report was read and explained to the subject who understood it and admitted it to be correct, and that submissions on behalf of the parties were heard, no reason, however, was given nor was the learned magistrate shown or stated to have considered and given regard to the matters specified in s 6(3) and (4) of the Act. So far as relating to the decision, all that appears in the note of proceedings was that the learned magistrate made the following order:

> Subject is to be remanded at Drug Rehabilitation Centre Sarawak for a period of two years with effect from today to undergo treatment and rehabilitation.

Nor was it stated in the note of proceedings as to whether the learned magistrate was satisfied that the subject was required to undergo treatment and rehabilitation at the centre. (See s 6(1)(a) of the Act.)

It is essential that magistrates give reasons for their decisions. This is all the more necessary where, as in the instant case, liberty of a person is involved and where the law requires that before making an order, the magistrate 'shall consider' a report of the rehabilitation officer (s 6(3)) and 'shall have regard' to the circumstances and the other factors as specified in s 6(4). It is incumbent on the magistrate to indicate in his judgment that the provisions of the said subsections have not been overlooked. No particular form of words is needed for the purpose. What is necessary is that the magistrate's mind should be clearly revealed that he has considered the matters. The absence of any recording that they had been considered indicates the possibility that the matters may not have influenced the mental process of the presiding magistrate in arriving at his ultimate decision.

I have considered and found no merits in the argument of the learned federal counsel. As conceded, the signed order pursuant to s 6(1)(a) of the Act (p 18 of the Bundle of Documents) was executed *after* the decision appearing in the note of proceedings had been made by the learned magistrate. The signed order appears to be in standard form, cyclostyled. All that was need to be done was to fill in the blanks and delete whatever was inapplicable. What the applicant challenges is the decision-making process, ie, the process of making the decision on 29 July 1991 *before* the signed order came into being.

Contrary to the contention of the learned federal counsel, *Re Roshidi bin Mohamed*[3] referred to by learned counsel for the applicant is, in my view, relevant and of assistance.

I am unable to accept the argument that an order under s 6(1)(a) of the Act is not amenable to certiorari or judicial review.

I also disagree that s 24 of the Act has the effect of relieving a magistrate from the need to record anything in coming to his decision. The section deals with jurisdiction of magistrates in relation to areas or localities and places for exercising the powers under certain sections of the Act.

For the above reasons, the motion is allowed. The order of the learned magistrate made on 29 July 1991 be removed forthwith into this court and be quashed.

A I should make clear that the above decision is arrived at after considering the decision-making process, ie, it has not been shown from the note of proceedings that the learned magistrate had considered the requisite matters as required by law before making the order as he did. No aspersion should be cast on the credibility of the learned magistrate by reason of the contents of his affidavits made on 27 February 1992 which I have earlier B held to be disregarded for the purpose of this motion.

Application allowed.

Reported by Wong Kian Kheong

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